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IN THE

Supreme Court of the United States

OCTOBER TERM — 1966

NO.

JOHN PIERCE HELLAMS,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, John Pierce Hellams, hereinafter referred to as "Hellams", prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the United States District Court for the Western District of South Carolina.

OPINIONS BELOW

The District Court for the Western District of South Carolina did not render an opinion. Its judgment is incorporated in the record at R-I-33a and is appended hereto on Page 1a of the appendix. The opinion of the Court of Appeals for the Fourth Circuit has not been reported to date. This opinion is incorporated in the record at Pages 16-22 and is appended hereto on Page 3a of the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was dated and entered on February 7, 1967 (R-23), and is appended hereto on Page 10a of the appendix. On February 27, 1967, Associate Justice William J. Brennan, Jr., of this Court granted an extension of time within which to file a petition for a writ of certiorari to and including April 8, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

QUESTIONS PRESENTED

1. Whether Hellams' constitutional right to a fair and impartial trial was denied by the Government's tactic of using multiple witnesses under compulsion to perjure themselves because they were awaiting sentences in various State and Federal Courts.

2. Whether in a conspiracy trial of eight defendants the Trial Judge abused his discretion in overruling Hellams' two motions for severance so that it became impossible for the jury to segregate the alleged substantive crimes of Hellams from the alleged conspiracy crimes of all of the defendants.

STATUTES INVOLVED

The pertinent provisions of 18 U. S. C. A., Section 2312, Page 244 are as follows:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

The pertinent provisions of 18 U. S. C. A., Section 2313, Page 262 are as follows:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

STATEMENT OF CASE

Federal jurisdiction in the Western District Court of South Carolina is based upon 18 U. S. C. A., Section 3231, which provides as follows:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United States."

Hellams, along with seven other defendants, was indicted in the Greenville Division of the Western District of South Carolina by a fourteen count indictment charging a conspiracy to violate and substantive violations of Title 18, U. S. C. A., Sections 2312 and 2313.

Hellams was charged with a conspiracy to violate the laws of the United States in Count One. In Counts Two, Six, Nine and Twelve of the aforesaid indictment, Hellams was charged with receiving stolen motor vehicles, moving in interstate commerce, knowing them to have been stolen. In Count Thirteen, Hellams was charged with transportation of a stolen motor vehicle, moving in interstate commerce, knowing it was stolen. The jury returned a verdict finding

Hellams guilty as charged in Counts One, Two, Six, Nine and Twelve, but they found him not guilty as to Count Thirteen. In due course, Hellams was sentenced to serve ten years in the Federal Prison.

The Government's theory was that some of the eight defendants purchased eight salvaged (wrecked) automobiles, which, in fact, had valid titles. The identification numbers were removed from these salvages and placed onto eight automobiles (of the same year, make, and model) which the defendants directed or requested to be stolen. The stolen automobiles then assumed the identity of the salvages, and they in turn were sold to bona fide purchasers. The ninth stolen automobile's identification number was not transferred.

Hellams, at the time of the alleged conspiracy (during 1964), was in the used car business. He operated as Laurens Auto Sales located in Laurens, South Carolina, where he purchased and sold used cars. It is clear from a study of the transcript that Hellams was not an active participant in the theft of the automobiles, in the alteration of the identification numbers, nor in any part of the actual conspiracy agreement. In fact, the Government's evidence merely shows that Hellams was in the chain of title of six of the nine stolen vehicles.

It is important to note the testimony of Johnny Fuller, Joseph Allan Lejune, and Robert Earle Roberts (hereinafter referred to as "Fuller", "Lejune" and "Roberts"). The above three witnesses for the Government tied the case against Hellams together; for without their testimony it is clear that the Government could never have got its case to the jury.

Fuller and Lejune were named in the indictment as co-conspirators and there is no question that they stole all of the automobiles at the direction of Herschel Elrod, another conspirator. (R-I-6a & 7a). Yet, the Government chose not to prosecute them, impliedly, for two reasons; first, so that the strict rules of evidence would be relaxed to permit damaging testimony into the record that otherwise would be inadmissible. The second inference is that the Government chose not to indict them for the express purpose of holding a possible additional five year prison sentence over their heads. If the two witnesses testified favorably for the Government, then of course there would be no prosecution. If, on the other hand, Fuller and Lejune did not testify in a manner that was expected of them, they could have faced additional prison sentences.

The second Government tactic that was even more despicable was the use of Fuller's and Roberts' testimony. Both of these admitted criminals had plead guilty in various State and Federal Courts to the same crimes in which Hellams was indicted. It is important to note that both of the above men entered guilty pleas prior to the trial of Hellams, and yet their sentences were postponed until after they testified against Hellams.[1]

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[1]While not a part of the trial transcript, it is interesting to note that both Fuller and Roberts were sentenced on the same date, April 11, 1966, some seventeen days after the conclusion of Hellams' trial and in different courts. Fuller, with a maximum five year sentence, was given a suspended sentence and placed on probation by the United States District Court for the Middle District of Georgia. Roberts, with a maximum five year sentence, was sentenced to serve nine months, with a three year probation. Ironically his sentence commenced on December 29, 1965, some three and one-half months before he was officially sentenced, so that he really only had to serve some five and one-half months in prison.

The damaging testimony of Fuller, Roberts and Lejune covers 147 pages of the trial transcript. However, only the highlights can be covered in this petition. After Fuller explained how he stole automobiles, he testified that he delivered four stolen cars to Hellams in Laurens, South Carolina. He indicated that Hellams and a Mr. King, one of the eight defendants, were partners who together operated Laurens Auto Sales. (R-I-8a & 9a). In fact, no business relationship existed between Hellams and King.

Lejune stated that he went to a used car lot in Laurens, South Carolina, which he thought was owned by King, but which he later learned belonged to Hellams. This testimony was most damaging to Hellams. (R-I-22a).

Roberts testified that he overheard Hellams and King talking about fixes, stealing cars, and about what they would do if they were ever caught with stolen cars in their possession. (R-I-23a & 24a). Roberts did not explain the circumstances surrounding the conversation nor when the conversation took place. He also testified that he personally observed the alteration of a serial number behind the garage of Hellams' used car lot. It was never brought out by Roberts to whom this car belonged. (R-I-24a).

It will be noted that Hellams made a motion for severance before the jury was empanelled, which was denied. The motion, although a part of the trial transcript, was omitted from the printed transcript. (R-I-35a).

The cross examination of a J. D. Rogers, Jr., the manager of the High Point Auto Auction, who guaranteed titles to cars which were auctioned at his auto

auction business, is just one example of how the antagonistic defenses of the defendants created a prejudicial effect against Hellams. Answers were forced from Rogers which inferred that Hellams was involved in the theft of certain automobiles. (R-I-3a).

Hellams promptly renewed his motion for severance on the basis that the cross examination of Rogers, although beneficial to another defendant, was detrimental to Hellams. His motion was again denied. (R-I-4a). As the trial progressed cross examination by some of the other six defendants forced witnesses to make prejudicial statements against Hellams.

Perhaps the cross examination which damaged Hellams most was when the defendant Horace King examined his former employee, Robert Earle Roberts, hereinabove referred to. King caused Roberts to testify that both King and Hellams always talked of car thefts when drunk and when sober. (R-I-26a & 27a).

Thus it can readily be seen that each of the eight defendants on trial had a defense which was antagonistic to the other defendants. For example, the defendant Mildred King attempted to show that she was merely an agent of her husband. Obviously she brought out details incriminating Hellams which helped her case. It is important that many of these details were not brought out in the Government's direct examination of the foregoing witnesses. Thus it is argued that Hellams' motion for severance should have been granted because of the antagonistic defenses of the defendants and because Hellams was not an active participant in the actual conspiracy agreement.

REASONS FOR GRANTING THE WRIT

1. Certiorari should always be granted in a criminal case presenting constitutional questions of continuing importance. It has long been settled that the United States Supreme Court need not be bound by the findings of lower courts when it is alleged that fundamental constitutional rights have been violated. *Jacobellis v. Ohio*, 378 U. S. 184 (1964); *Haynes v. Washington*, 373 U. S. 503 (1963); *Watts v. Indiana*, 328 U. S. 49 (1949); *Hoover & Allison v. Evatt*, 324 U. S. 652 (1945); *Norris v. Alabama*, 294 U. S. 587 (1935). The United States Supreme Court has stated with clarity that its duty to make its own independent examination of the record when federal constitutional deprivations are alleged is clear because if its solemn responsibility for maintaining the Constitution inviolate. *Napue v. Illinois*, 360 U. S. 264, 271 (1959).

Without question, Hellams would not have been convicted if Roberts, Fuller and Lejune had not testified against him. Only by means of their testimony was Hellams connected with the conspiracy to steal automobiles and place a salvaged identification number onto them. Fuller and Lejune were named in the indictment as co-conspirators, and there is no question that they stole all of the automobiles at the direction of Herschel Elrod. Yet the Government chose not to indict them so that they would introduce evidence against Hellams as Government witnesses.

Further, the record discloses unequivocally that Roberts and Fuller had plead guilty in various State and Federal Courts to automobile theft, transportation of stolen automobiles and alteration of serial

numbers, but their sentences were withheld until after the conclusion of Hellams' case.

Counsel for Hellams conclude that the Government's tactic of using the testimony of Roberts and Fuller is unconstitutional. Both men were under compulsion to perjure themselves in order to please the Government because their sentences in various State and Federal Courts were withheld until after they testified in behalf of the Government. It is argued that such a tactic presents almost (if not) a prima facie case of extortion of evidence. It is strongly urged that a new rule be created outlawing testimony of persons awaiting sentence for criminal offenses.

Why should a man's sentence be withheld for three or four months until after he testifies on behalf of the Government? After most defendants are found guilty they are immediately sentenced. There is no question that the above tactic used by the prosecuting authority denies the defendant of a fair trial. It is clear that such a device offers a premium to false testimony. Because no man wants to go to prison, the criminal awaiting sentencing who testifies for the Government knows what is expected of him. He realizes his dilemma: if he testifies favorably for the Government, the prison sentence he faces will either be suspended or substantially shortened. On the other hand, if he does not testify favorably for the Government, the prison sentence he faces will undoubtedly be the maximum. It is obvious under the above circumstances that most, if not all, criminals awaiting a future prison sentence will choose to perjure themselves on the witness stand rather than face the prospect of a possible elongated prison sentence.

It is strongly argued that the above procedure used by the Government violated both the Fifth and Sixth Amendments to the United States Constitution. Both sections of the above Amendments to the United States Constitution have been interpreted on numerous occasions to mean that every defendant has the constitutional right to receive a fair and impartial trial. *U. S. C. A., Constitutional Amendment, V,* Section 183 (P. 570); *U. S. C. A., Constitutional Amendment VI,* Section 104.

It is recognized that from the earliest times, it has been considered necessary for the detention and punishment of crime, for the State and Federal Government to resort to the criminals themselves for testimony with which to convict possible confederates in crime. It is conceded that such a course tends to prevent and break up combinations, by making criminals suspicious of each other and it often leads to the punishment of guilty persons who would otherwise escape.

However, such a course offers a premium to treachery and sometimes permits the more guilty to escape while innocent parties become entangled in the spiral of a conspiracy charge that uses the testimony of criminals to complete its dangerous web.

In the light of the recent Supreme Court decisions, it is argued that the testimony of Fuller, Lejune and Roberts is as tainted as is the confession obtained by duress and force. It is as unconstitutional as is evidence obtained by unlawful search and seizure. How could Hellams have received a fair and impartial trial when the evidence which convicted him was obtained

from three admitted criminals who testified in hope that they would receive either immunity from prosecution or a lighter prison sentence?

Counsel for Hellams argue that the testimony of Fuller, Lejune and Roberts violates the very core of the Constitution. Their evidence is as tainted as is the involuntary confession. If the conviction of Hellams is permitted to stand, we shall continue to have in this area distorted constitutional law in action in the Federal District Courts.

2. The United States Supreme Court has granted a writ and exercised its supervisory power when the quality and fairness of federal law enforcement is completely lacking. This Court granted a new trial in one federal case involving the testimony of an unsavory informer because of its supervisory jurisdiction over the proceedings of the Federal Courts. The Supreme Court's duty, in this regard, is to make certain that the waters of justice are not polluted. And when the waters are polluted, the condition should be remedied at the earliest opportunity. *Mesarosh v. United States*, 352 U. S. 1, 14 (1956). See also, *McNabb v. United States*, 318 U. S. 332, 341 (1943).

The Government in the case at bar used two despicable tactics in its zeal to make sure that Hellams would be convicted. First it used the conspiracy doctrine, and secondly it used the testimony of co-conspirators (not indicted) so that the strict rules of evidence would be relaxed, thereby letting in otherwise inadmissible evidence.

In the case of *Krutewitch v. United States*, 336 U. S. 440 (1949), Supreme Court Justice Jackson, in

a strong concurring opinion outlined the inherent damages of the use of a conspiracy charge as follows:

> "Its history (conspiracy) exemplifies the tendency of a principal to expand itself to the limit of its logic. The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness of our administration of justice." *Krutewitch v. United States*, Supra, P. 445, 446.

The naive assumtion that all of the prejudicial effects of a conspiracy trial can be overcome by instructions to the jury, all practicing court room attorneys know to be unmitigated fiction. *Blumenthal v. United States*, 332 U. S. 539 (1947); *Skidmore v. Baltimore & O. R. Co.*, 167 F. 2d 54 (2nd Cir. 1948).

The opinion of Mr. Justice Jackson in the Krutewitch case, Supra, that conspiracy charges are not favored at law was reaffirmed by the United States Supreme Court on many occasions. *Grunewald v. United States*, 353 U. S. 391 (1957); *Delli Paoli v. United States*, 352 U. S. 1 (1957); *Lutwak v. United States*, 344 U. S. 604 (1953).

There is no question that Fuller and Lejune should have been prosecuted in the present conspiracy case because they admitted that they were active participants in the conspiracy plot itself. The Government named them as co-conspirators without indicting them so that it could get procedural advantages to ease the way to Hellams' conviction. Hellams was confronted with a hodgepodge of acts and statements by Fuller and Lejune which presuaded the jury of the

existence of the conspiracy, itself. In other words, the conspiracy was established by evidence that was admissible only upon the assumption that a conspiracy existed as to Hellams.

It is clear that the Government was successful in its attempt to expand the conspiracy doctrine to include Hellams into its fold. There is no doubt that the sinister atmosphere created by the Government catapulted the innocent circumstances of Hellams into the illusion of a chain of guilt. Hellams was found guilty not because of independent testimony but rather because of "guilt by association". It was impossible for Hellams to make his own case stand on its own merits in the minds of the jurors who were ready to believe that "birds of a feather are flocked together".

It is obvious that a conviction should be set aside where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction. *Krutewitch v. United States*, Supra, P. 457.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a Writ of Certiorari be granted.

Respectfully submitted,

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PROOF OF SERVICE

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I, Porter B. Byrum, one of the attorneys for John Pierce Hellams, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 6th day of April, 1967, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid to Albert Q. Taylor, Esq., Assistant United States District Attorney for the Western District of South Carolina, Post Office Box 10349, Greenville, S. C. 29603, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to The Solicitor General, Department of Justice, Washington 25, D. C.

JUDGMENT AND COMMITMENT

United States District Court

FOR THE

DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA
v.
JOHN PIERCE HELLAMS
No. C/14,183

On this 25th day of March, 1966 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty entered on 1-31-66 and having been found Guilty on 3-24-66 of the offense of violation of Secs. 2312, 2313 Title 18 U.S.C. as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years as to Ct. 1. As to Cts. 2, 6, 9, 12; Five (5) Years on each Count to run concurrently with each other but to run consecutively with sentence in Ct. 1. Total sentence Ten (10) Years.

IT IS ADJUDGED that the defendant was found Not Guilty as to Ct. 13.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

. . . . . .

/s/ J. ROBT. MARTIN, JR.
United States District Judge.

(Signed) . . . . . .
Clerk.

(By) . . . . . .
Deputy Clerk.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 10,577.

United States of America,
Appellee,

versus

George Boswell,
Appellant.

No. 10,604.

United States of America,
Appellee,

versus

John Pierce Hellams,
Appellant.

No. 10,659.

United States of America,
Appellee,

versus

Charles Ambry Barrett,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT GREENVILLE.

J. ROBERT MARTIN, JR., DISTRICT JUDGE.

(Argued January 9, 1967. Decided February 7, 1967.)

Before BOREMAN, WINTER and CRAVEN, Circuit Judges.

Robert B. Thompson (Robinson, Thompson, Buice & Harben on brief) for Appellant in No. 10,577; Melvin K. Younts and Porter B. Byrum (Louis A. Trosch, Byrum & Byrum and Younts, Reese & Cofield on brief) for Appellant in No. 10,604; Clifford F. Gaddy, Jr., (Court-appointed counsel) for Appellant in No. 10,659; and Albert Q. Taylor, Jr., Assistant United States Attorney, (John C. Williams, United States Attorney, on brief) for Appellee.

CRAVEN, Circuit Judge:

These are the appeals of three of eight defendants charged with participation in a conspiracy to steal, transport, and alter the identification of automobiles in violation of 18 U.S.C.A. Sections 2312 and 2313.

The government's theory, amply supported by evidence at the trial, was that two coconspirators (not indicted) were employed to steal and deliver automobiles, and thereafter the true identification numbers were obliterated and new identification numbers were provided by taking them from purchased wrecked salvages identical to the make and model of the stolen car. Some of the conspirators would remove from the

wrecked vehicles the serial plate and all locks for the ignition, doors, and trunk. The package was known in the business as "sack salvage."

Boswell

The evidence clearly established that three salvage sacks were obtained from Boswell and used to conceal the identity of three stolen automobiles. In addition, there was testimony sufficient to permit the jury to infer that some of the stolen automobiles were driven from Boswell's place of business to other places of disposition and sale. We think the evidence was sufficient to be submitted to the jury and to support a verdict of Boswell's guilt.

Boswell earnestly insists that the court erred in admitting heresay testimony of government witness Roberts. Roberts was permitted to testify over timely objection that Hellams and King told him that they had bought sack salvage from Boswell and that they told him that some of the estimated 125 cars driven by Roberts from Boswell's place of business were stolen vehicles. In order for such testimony to be admissible against Boswell, it must have been made (1) during the pendency of the conspiracy and (2) in furtherance of its objectives. It is admissible under these circumstances only after a prima facie case of conspiracy is established, and only then if there is proof *aliunde* that the one sought to be implicated by the testimony is connected with the conspiracy.

Boswell concedes in his brief, arguendo, that the evidence contained in the record might establish prima facie a conspiracy among some of the defendants. We disagree with his contention that there was

no proof *aliunde* connecting Boswell with the conspiracy and that the hearsay statements attributed to Hellams and King were not made in furtherance of the conspiracy. Roberts explained that Hellams and King told him the vehicles were stolen because "they was wanting me to take precaution not to get caught driving the cars, speeding." Such a purpose would be in furtherance of the conspiracy. We think the three salvage sacks obtained from Boswell and used to conceal the identity of three stolen automobiles[1] constitutes proof *aliunde* connecting him with the conspiracy sufficiently to make competent the testimony to which objection was made.

Boswell further insists that the court erred in refusing to instruct the jury that the government must prove that one of the overt acts in the conspiracy indictment occurred in the Western District of South Carolina. A conspiracy indictment may be prosecuted either at the place where the conspiracy was formed, *Dealy v. United States*, 152 U.S. 539 (1894), *or* where any of the overt acts were committed, *Hyde v. United States*, 225 U.S. 347 (1912). The indictment charged that the formation of the conspiracy occurred in the Greenville Division of the Western District of South Carolina, and further charged the commission of several overt acts within that district. There could not have been a conviction under the indictment without a finding by the jury that the conspiracy was formed in the Greenville Division of the Western District of South Carolina for the simple reason that the indictment so specified and no other conspiracy was charged. The jury was told that they should initially

[1]That they were so used was established by evidence independent of Roberts' testimony.

consider and first determine whether or not the conspiracy "existed as alleged in the indictment." Where the indictment itself locates the place of formation of the conspiracy, we think a general instruction is sufficient with respect to the venue question.

Barrett

Barrett operated a two-man garage located immediately behind his home. The jury could have found properly that a stolen 1964 blue Pontiac was altered at Barrett's garage to obliterate its true identification numbers and to substitute sack salvage identification numbers furnished by another conspirator. True, it does not appear affirmatively that Barrett was actually present when the illegal alteration was being accomplished. Considered alone, the testimony would be insufficient to put Barrett in the web of the conspiracy, but one of the confessed thieves testified that Barrett and another conspirator actually instructed him in the technique of stealing automobiles, i.e., how to "pop a switch." If believed by the jury, that testimony is sufficient to establish Barrett's participation in the conspiracy and becomes persuasive of his guilt when considered in connection with the alteration of a stolen vehicle so close to his residence.

Barrett's other assignment of error is stated in the form of a question: "is realization of profit or gain an element of the crime of conspiracy?" The answer is "no." Clearly, division of profits may be an integral part of a conspiracy and proof of the same (if available) would strongly tend to prove guilt. But a sharing of the fruits of the conspiracy has never been held, so far as we know, to be an essential element

of the offense. *Rizzo v. United States*, 304 F.2d 810 (8th Cir. 1962), relied on by Barrett, is not to the contrary.

Hellams

Hellams does not challenge the sufficiency of the evidence to support the guilty verdict. Directly or indirectly, he was connected with eight of the nine stolen automobiles. Hellams primarily insists that he was denied a fair, impartial trial because two of the coconspirators who testified against him were awaiting sentence in either state or federal court and were thus under compulsion to perjure themselves in order to please the prosecuting authority. It is urged that offering the testimony of coconspirators who are under compulsion inherent in awaiting sentencing is a violation of the Fifth and Sixth Amendments to the United States Constitution. We are asked to create a new rule outlawing testimony of persons awaiting sentence for criminal offenses. We think it beyond our province to do so. The motivation to testify is not necessarily the same as the motivation to testify falsely. Hellams was afforded some protection by the right of cross-examination. Counsel were free to impugn the motivation of the witnesses to the jury and attempted to do so. There was no intimation in the record nor any offer of proof that any promise, express or implied, had been made by the United States in consideration of the testimony of the prosecuting witnesses. The impact of the argument is diminished by the fact that another coconspirator, Lejune, effectively testified for the government although he had already been sentenced to a ten-year term of imprisonment on state charges. In our judgment, no constitutional right of Hellams has been infringed by allowing co-

conspirators who have not yet been punished to testify against him.

Hellams' other assignment of error is that the district judge abused his discretion in overruling Hellams' motion for a severance. It is well settled that the granting of separate trials to persons jointly indicted is a matter of discretion. *Paoli v. United States*, 352 U.S. 232 (1957); *Opper v. United States*, 348 U.S. 84 (1954); *United States v. Miller*, 340 F.2d 421 (4th Cir. 1965). The severance argument goes to the heart of the conspiracy technique. From the prosecutor's standpoint, perhaps the chief appeal of the conspiracy form of indictment is the opportunity to dispose of multiple prosecutions in one trial. There are, of course, inherent dangers in such a process. See *Krutewitch v. United States*, 336 U.S. 440, 445-58 (1949) [Mr. Justice Jackson, concurring]; *Hyde v. United States, supra*, 225 U.S. at 384-91 [Mr. Justice Holmes, dissenting]. In terms of sheer numbers, we recognize that there are limitations as to how many defendants may fairly be included in one trial without the entire enterprise becoming unmanageable both for judge and jury.

We think, however, on the facts of this case that the experienced district judge was able to and did in fact keep separate in the minds of the jury the elements of the conspiracy, the overt acts, and the separate participation of each defendant. We find no abuse of discretion in the denial of the motion for severance. See *United States v. Bryant*, 364 F.2d 598 (4th Cir. 1966).

No. 10,577 *Affirmed.*
No. 10,604 *Affirmed.*
No. 10,659 *Affirmed.*

JUDGMENT

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 10,604.

UNITED STATES OF AMERICA,

Appellee,

vs.

JAMES PIERCE HELLAMS,

Appellant.

Appeal from the United States District Court for the District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ J. B. CRAVEN, JR.

United States Circuit Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1232

JOHN PIERCE HELLAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 3a–9a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1967. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to April 8, 1967, and on April 7, 1967, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner should have been granted a severance.

262-184—67

2. Whether petitioner was deprived of a fair trial because two witnesses, who had been convicted of other crimes but had not yet been sentenced, testified against him.

STATEMENT

After a jury trial in the United States District Court for the Western District of South Carolina, petitioner was convicted, with seven others, of conspiracy to sell stolen automobiles and of four counts of receiving and selling stolen vehicles (18 U.S.C. 371 and 2313). On March 25, 1966, petitioner was sentenced to concurrent terms of imprisonment for five years on each of the substantive counts, and to five years' imprisonment on the conspiracy count, the latter sentence to be consecutive to the other five year terms. The court of appeals affirmed.

The evidence, the sufficiency of which has not been challenged, showed that petitioner operated a used-car business, Laurens Auto Sales, in South Carolina, and that he there knowingly received from his co-conspirators cars stolen in interstate commerce. The stolen vehicles had been selected to match the characteristics (make, model, color, *etc.*) of lawfully purchased salvaged cars; the serial number plates, and frequently the titles, of the latter were used for the stolen vehicles, which petitioner then sold in the course of his business. (Tr. 284–285, 436–438, 440, 442, 502–503, 513, 516–517, 541, 563.)[1]

[1] References are to the transcript ("Tr.") of trial, the two volumes of which we are lodging with the Clerk of the Court, and to petitioner's appendix in the court below ("R. I"), which was filed with the petition.

ARGUMENT

1. Petitioner moved for a severance before the jury was empaneled and later during the course of trial (R. I 35a; Tr. 297). The denial of the motions was a permissible exercise of the trial court's discretion (see *Opper* v. *United States,* 348 U.S. 84, 95) and raises no issue warranting review in this Court. Petitioner points to no basic conflict among the defense theories,[2] no significant evidence admitted at the joint trial that would have been inadmissible against him alone, no likelihood that the joint trial confused the jury to his prejudice,[3] and most importantly (see *Krulewitch* v. *United States,* 336 U.S. 440; *Delli Paoli* v. *United States,* 352 U.S. 232) no inculpatory statement of one of his co-conspirators or co-defendants that was used against him. We also note that petitioner was not on the fringe of the conspiracy; on the contrary, his used-car business was a keystone of the scheme and he was a major and active participant in it. Indeed, he was convicted on four substantive counts of receiving the stolen cars, in addition to the conspiracy charge.

2. Two of the principal witnesses against petitioner (Fuller and Roberts) had pleaded guilty in State and federal courts to automobile theft, receiving stolen

[2] The evidence petitioner refers to as having "damaged" him (Pet. 7) plainly did so only because of his integral involvement in the conspiracy. That some of that evidence was gratuitously elicited by counsel for other defendants does not establish that the defense theories were inconsistent or that petitioner was prejudiced.

[3] The jury returned a not guilty verdict on count 13, which charged petitioner with having transported an additional stolen car in interstate commerce; it would thus appear that the jury was clearly able to differentiate among the various charges.

goods, and alteration of serial numbers. At the time of their testimony they had not yet been sentenced (Tr. 431–432, 538, 546). Petitioner contends that it was an infringement of his constitutional rights for the evidence of these witnesses to be admitted at his trial,[4] arguing that they were under strong pressure to testify favorably for the government. The situation of the witnesses, each of whom denied receipt of promises from the government, and their credibility (which was explored by petitioner's counsel on cross-examination, see Tr. 476–477, 547) were matters for the jury's consideration. See, *e.g.*, *Diaz-Rosendo* v. *United States*, 357 F. 2d 124, 130 (C.A. 9), certiorari denied, 385 U.S. 856; *United States* v. *Rainone*, 192 F. 2d 860 (C.A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1967.

[4] Petitioner also objects (Pet. 12) to the testimony of a third witness (Lejune), named as a co-conspirator but not indicted, who had previously been convicted and sentenced (Tr. 511) to imprisonment by a state court for car theft. The prosecutor could choose, in his discretion, not to prosecute Lejune, and the fact that he did so obviously does not render Lejune incompetent to testify.

U.S. GOVERNMENT PRINTING OFFICE: 1967